therefore arise which in general terms can be stated as follows :—.

(a) Does clause two offend against the Perpetuity Rule?

(b) Is the gift over, that is, after the deaths of the children and grandchildren does the benefit of the Wakaff pass "to the most learned and pious man in this country", validly, as being good charitable bequest.

As regards (a) the Rule is that, subject to certain exceptions, no contingent or executory interest in property can be validly created, unless it must necessarily vest within the maximum period of one or more lives in being and 21 years afterwards. Consequently a devise or bequest not falling within one of the exceptions is void if it is to take effect on the happening of an event at some indefinite future time or within a fixed period exceeding 21 years; for it is not necessary that the period within which the interest is to vest should be limited with reference to a life.

It is quite clear that the provision for the benefit of the *Wakf* passing on "to the most learned and pious man in the country" after the deaths of the sons and daughters of the Testator and also of his grandchildren, offends against the Perpetuity Rule. A gift over to a charity conditional upon a future and uncertain event which may not happen within the period allowed by the Rule is void *Chamberlayne v. Brockett*[2] and *In re Lord Stratheden and Campbell*[3]. It follows that the vesting is postponed beyond the Perpetuity Rule limit, i.e. after the deaths of grandchildren. There are also further reasons for holding that the gift over is bad. The mere creation of a *Wakf* does not necessarily imply that the objects intended to be benefitted thereby are charitable objects. Many cases of *Wakf* dedication that came before me in Palestine could not, by any stretch of imagination, have been deemed to be dedications for charitable objects. Such fact is confirmed in the unreported case of Suit No. 145 of 1922[4] in the Court of Appeal in the Judgments of Whitley J. and Barrett-Lennard J. and by Sheriff J. in *Ashabee and Others v. Mahomed Hashim and Another*[5]. Neither is it possible to apply the cy-pres doctrine. It is unnecessary, I think, to go into the other various authorities quoted to me as I am quite clearly of the opinion that the gift over after the deaths of the widow, children and grandchildren offends against the Perpetuity Rule, and that such gift over is not a charitable gift, and is also bad for uncertainty and vagueness.

The life interest to the widow and children of the Testator is good and upon determination of these estates, the beneficial interests fall into and form part of the residue of the estate to be disposed of in accordance with Clause 6 of the Will. There will be an order accordingly and the costs as between solicitor and client of all parties will come out of the estate.

Order Accordingly.

In the Estate of CHOO KIM KIEW, deceased: CHUA KENG GEOK and others v. BRITISH MALAYA TRUSTEE & EXECUTOR CO., LTD.

[Orig. Civil Juris. (Taylor, J.) March 29, 1949]

[Singapore — Civil Suit No. 126 of 1948]

Wills Ordinance, Ss. 15 and 16 — Alteration in Will — Requirements for revocation of will or part of will.

In this case it appeared that the testator after making his will wished to make certain alterations in it. She made the alterations in the Will and put her initials and the date, but the alterations were not signed or initialled by any witness. The testatrix subsequently died and the Executors propounded the Will. The original words in the Will were still clearly legible and the question was whether the Will was operative as originally drawn or as altered by the testatrix.

Held, (1) that by virtue of Section 16 of the Wills Ordinance and as the testatrix had not rendered illegible the words no longer desired by her and had not signed her deletions or had her initialling thereof witnessed, the alterations in the Will were not valid; (2) that therefore the Will ought to be admitted to probate retaining the smudged but still legible words.

PROBATE SUIT.

John Eber for the Plaintiffs.

K. A. Seth for the Defendants.

Taylor, J. : — This Probate action raises what Counsel described as a unique problem in the construction of a statute.

The facts are simple and undisputed. The testatrix made her Will in 1937; it was drawn by her Solicitor, Mr. R. L. Eber, and duly attested by him and his clerk.

In 1941, she consulted him with a view to making a fresh Will. The main change in the dispositions which she contemplated was the omission of certain gifts to her adopted son. In August 1941, she handed the Will to Mr. Eber having struck out the name of the adopted son in three places, adding her initials and in one place the date, 8th July 1941, but the alterations are not signed or initialled by any witness. In each place the original words are still clearly legible. The testatrix did not, however, give any definite instructions but went away to consider the matter further. The Will remained in Mr. Eber's office.

Nothing further was done in that year. From 1942 to 1945, it was difficult or impossible for her to proceed owing to the Japanese occupation. In 1946, the testatrix died without having taken any further step. Her daughters petitioned for a grant of administration on the footing that the Will is inoperative. Mr. Eber, having recovered the Will, with other papers, from his former office, informed the executors of its existence and of his doubt as to whether it is operative. The executors now propound the Will and the questions are, whether it is operative and if so whether as originally drawn or as altered in 1941.

The document as it stands may be read in two ways. If the alterations are ignored it is the last Will of the testatrix, duly executed. During her life it represented also a draft of a new Will containing different dispositions which she considered but which, at the date of the last consultation, she had not decided to make. If she ever reached a decision, she did not take any steps to implement it. Even if the alterations which she initialled had represented a testamentary intention, they would, on the authorities, have failed for want of attestation.

On the facts as I find them, it is clear that in England the Will would be admitted to probate with the deleted words restored.

The Wills Ordinance of the Colony deals with alterations in Section 16 which reads :—

> No obliteration, interlineation or other alteration made in any will after the execution thereof shall be valid or have any effect so far as the words or effect of the will before such alteration shall not be apparent, unless such alteration shall be executed in like manner as hereinbefore is required for the execution of the will; but the will, with such alteration as part thereof, shall be deemed to be duly executed if the signature of the testator and the subscription of the witnesses be made in the margin or some other part of the will opposite or near to such alteration or at the foot or end of or opposite or near to such alteration, or at the foot or end of or opposite to a memorandum referring to such alteration and written at the end or some other part of the will.

This is based on Section 21 of the English Act and the first portion is identical, but for one word.

The Act provides that no alteration shall have any effect EXCEPT so far as the original words are not legible.

In the Ordinance the word "except" is omitted from the third line.

The Revised Edition of 1919 contained the word "except". The Edition of 1925 omitted it. The Edition of 1936, which is still in force, follows that of 1925. (There are words in the last part of the section which do not appear in the Act and are probably attributable to a printer's error but they do not affect this case).

This is yet another illustration of the unwisdom of the policy of making revised, as distinct from collected, editions of statutes.

As far as reported cases go it seems that this particular error has never before been noticed. This is not strange because in this country very few testators make their own Wills and a solicitor would regularise alterations by codicil.

From the historical standpoint, I am satisfied that the omission of the word "except" was a mere clerical error but, as a matter of construction, inadvertence cannot be attributed to the legislature. In a case of grave necessity, a word or two may be rejected as surplusage but nothing may be added. If a printer's devil omits the word "not" and the revising Commissioner fails to notice the error, the law is reversed. The omission of the word "except" converts what was an exception into a positive enactment in the opposite sense. In short, the exception becomes the rule but the section must be construed accordingly, whatever the consequences.

Manifestly, cases decided on the Act containing the word "except" cannot be regarded as authorities on the construction of an Ordinance omitting that word.

It falls to me therefore to approach this section as it stands and to construe it *tabula rasa*.

The section deals with "obliteration, interlineation or other alteration made after execution". In this will, some words were untidily smeared over with ink, long after execution, but they are still legible; in my opinion they are alterations, *ejusdem generis* as obliterations.

Omitting words not directly applicable to the decision of this case, the section reads thus :—

> No alteration made after execution shall have any effect so far as the words of the will before such alteration shall not be apparent unless such alteration shall be executed and attested by two witnesses but the will, as altered, shall be deemed to be duly executed if the signatures of the testator and witnesses be made in the margin.

Now in this peculiar case we are not in the least concerned with the question whether the words used constitute a wise or desirable provision of law. Perhaps they do not. In view of their history it is scarcely to be expected they would. The question is whether, in their ordinary plain and grammatical meaning, they make sense in their context. If they do, effect must be given to them.

In my opinion, the words are sufficiently clear. They contemplate the case where the will is first of all completely executed, as required by section 6, and afterwards an alteration is made, and they provide that in such a case the alteration shall not have any effect, where the original words have completely vanished unless the deletion is signed and attested. There must be two witnesses to the alteration but they need not be the same persons as the witnesses to the original execution of the will.

This is consistent with the general scheme of the Ordinance. The will can be made signed and witnessed in the ordinary way. Later, no matter how long afterwards, the testator can wipe out certain words. They must be wiped out utterly and the deletion must be authenticated by the signatures of the testator and two witnesses. Under these conditions the will is valid, as amended by the deletion.

In short, the section provides for amendment by authenticated revocation of particular words. It might be criticised on the ground that it provides only for naked revocation and does not cover additions or substitutions. But if a testator wishes to add or substitute, he can make a codicil or a fresh will. To cut out certain words, leaving a blank is one thing. To substitute others in the same sheet of paper is something far more untidy and difficult. It is not unreasonable to attribute to the legislature an intention to provide a shorter and more convenient method of cutting out a clause while still insisting on the normal formalities for making new clauses.

I do not for a moment suggest that anyone deliberately and consciously thought of it in this way. I am merely examining what appears in the Revised Edition to see if it is reasonable as it stands. In my view it is quite sensible and practical, so far as it goes. I agree that on this construction the section does not cover additions or substitutions but the omission to provide for other, and perhaps more likely, cases does not make the existing provision unreasonable. In any event, I am now concerned with one specific testatrix who, in so far as her thoughts are revealed by her actions, considered revocation only. She proposed certain deletions. She failed in two respects to carry them out as prescribed. First she did not render illegible the words no longer desired; secondly she did not sign her deletions or have her initialling thereof witnessed. Either of these facts is, alone, sufficient to preclude her alterations from validation by section 16.

There is no section of the present Ordinance which deals expressly either with ineffective attempts to obliterate words or with unattested obliterations.

It remains to consider whether such circumstances are covered by any provision of the Ordinance. An answer to this question is suggested by section 15 which provides that no will, "or any part thereof" shall be revoked otherwise than by one of the methods specified in the Ordinance, such as subsequent marriage or later will. None of these apply to the case before me and it therefore follows from section 15 that no part of the will in question was revoked.

I therefore give judgment for the defendants and admit the will to probate in solemn form, retaining the smudged but still legible words.

Order Accordingly.

The Malayan Law Journal

20, MALACCA STREET, SINGAPORE.

Editor: B. A. MALLAL.
Telephone 2301.

Asst. Editors: AHMAD IBRAHIM, B.A.
MUNIR A. MALLAL, M.A.

Vol. XV. July, 1949. No. 7.

CONTENTS.

NOTES OF CASES:—

Federation 147
Singapore 149

REPORTS:—

Goh Ah Yew v. Public Prosecutor 150
Public Prosecutor v. Lim Geok Ching & Tan Yow 154
Public Prosecutor v. Goh Ah Moi (f) 155
Tay Choon Nam & 2 Ors. v. Rex 157
Deputy Public Prosecutor v. Isaac Elion 160
Braga v. Braga 161
Rex v. Green Bus Co., Ltd. 163
Chen Chi Ya v. K. Nagappan 164
Rex v. Teo Cheng Lian & Rex v. Leck Kwee Ser 170
Er Gek Cheng v. Ho Ying Seng 171

NOTES OF CASES.

FEDERATION.

Common Gaming House Ordinance S.S. Secs. 4 (c), 7(2) and 9—Criminal Procedure Code S. 296.

In this case the respondent was originally charged with assisting in carrying on a public lottery contrary to s. 4(c) of the Common Gaming Houses Ordinance. After a few witnesses had been called for the prosecution the Court allowed an application by the prosecuting officer to add an additional charge under the same paragraph of the same section in respect of another lottery. At the conclusion of the evidence for the prosecution the learned Magistrate held that the presumption under s. 9 of the Ordinance did not arise in respect of either charge i.e. that the evidence did not establish that the respondent was in possession of ten or more tickets in either of the lotteries named in the charges. The Magistrate then exercised his power to substitute a single new charge viz: that respondent bought a lottery ticket contrary to s. 7(2) of the Ordinance. To this charge the respondent pleaded guilty and was fined the sum of $20/-. The Public Prosecutor appealed on the ground of inadequacy of sentence. Mr. Sault, Counsel for the respondent, submitted as a preliminary objection that there was no right of appeal in this case.

Held, (Pretheroe, J.), that by virtue of S. 296(2) of the Criminal Procedure Code (S.S.) the appeal will not lie when the maximum punishment is a fine of $25/-.

The preliminary objection upheld and appeal dismissed. Good (D.P.P.) for Appellant; W. H. Sault for Respondent.

Public Prosecutor v. Kiew Ah Wan (Malacca Criminal Appeal No. 1 of 1949). Decided on April 28, 1949.

Criminal Procedure Code Ss. 147, 158 and 254—Withdrawal of charge—Whether discharge should amount to accquittal or not—Proof of exhibits—Alibi Defence.

In this case the accused was charged with robbery. It appeared he had been previously charged for the offence, but the charge had been withdrawn and that he had been discharged not amounting to an acquittal. The accused was acquitted.

In the course of his judgment Callow, J. dealt with various unsatisfactory features of the trial and inter alia ruled:

(1) When a charge is withdrawn and the accused discharged, the discharge should amount to an acquittal unless good cause is otherwise shown. An accused person is entitled to trial and determination; only in exceptional circumstances should the charge be permitted to remain indefinitely held against him.

(2) In non-bailable cases, bail is at the discretion of the Court and in exercising its discretion the Court must consider the gravity of the crime.

(3) A committing Magistrate should enquire from the accused person on committal as to whether

he requires a copy of the depositions so that he may have early opportunity to prepare his defence.

(4) It is essential that there should be a proper proof of exhibits from the time of acquirement. The chain must be complete from first possession to the Court.

(5) Even in cases where the defence of alibi has not been disclosed, the Police should make enquiries as to the whereabouts of the accused at about the time of the alleged offence.

R. v. Liddle 21 Cr. App. R. 3, Sohoni, 14th Ed. pp. 651, 963, and Mallal's Criminal Procedure 3rd Ed. pp. 256, 257, 445 & 446 were referred to.

C. V. Boyle for Public Prosecutor; Lee Thean Chu for the Accused.

Public Prosecutor v. Mat Zain bin Yahya (Kedah Criminal Trial No. 6 of 1949). Decided on May 5, 1949.

Foreign Judgment — Enforcement of judgment of District Court of Ceylon in Kedah — Reciprocal Enforcement of Judgments Enactment, Kedah.

In this case the plaintiff claimed inter alia (a) judgment against the defendant in terms of a decree for divorce "a vinculo matrimonii" No. 287 Divorce made in the District Court of Jaffna, Ceylon and dated the 18th day of November 1946, (b) arrears of alimony. At the hearing the defendant took the preliminary point that the Court had no jurisdiction to entertain the claim.

Held, (1) that the proper procedure was for Counsel for defendant to raise the point as to jurisdiction in the pleadings so that it could then have been set down for separate and preliminary hearing and disposal; (2) that the Kedah Reciprocal Enforcement of Judgments Enactment cannot be invoked to aid a Ceylon Court judgment and it was for the Court to consider whether the plaintiff can sue on the foreign or dominion judgment; (3) that a foreign or dominion judgment is conclusive as to any matter directly adjudicated upon between the same parties except (a) where it has not been pronounced by a Court of competent jurisdiction; (b) where it has not been given on the merits of the case; (c) where it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognise the law of Malaya or of any of them in cases in which such law is applicable; (d) where it has been obtained by fraud; (e) where the proceedings in which the judgment was obtained are opposed to natural justice; and (f) where it sustains a claim founded on a breach of any law in force in Malaya or any of them.

James Taylor for Plaintiff; Lim Kheng Kooi for Defendant.

Maheswary d/o Sinniah Thambimuttu v. Suppiah Kanagalingam (Alor Star Civil Suit No. 25 of 1949). Decided on May 29, 1949.

Labour Code, S. 93 — Contract — Employer and Employees — Custom of trade.

In this case the only point of substance in dispute between the parties was whether or not an employer in the fish catching business (that is to say in this case the Appellant) is entitled to deduct from wages advances made by him to his employees at the commencement of the period of service when the contract of employment is terminated by him and not by them. The Deputy Commissioner for Labour from whose decision this appeal was heard held that there is a custom of the trade whereby when, as in this case, it is the employer and not the employees who terminate the contract of service, the employer is not entitled to deduct advances made by him. He held that the custom was an implied term in the contract of service in the case and decided the dispute before him accordingly.

Held, (Thomson, J.), that a custom to be good must be reasonable, certain and notorious and the appeal was allowed.

Devonald v. Rosser & Sons, (1906) 2 K.B.D. 728 was referred to.

Lee Eng Joo alias Lu Meng Joo v. Kok Boon Keng and 17 Others (Perak Civil Appeal No. 3 of 1949). Decided on May 9, 1949.

Penal Code Ss. 408 and 477A — Joinder of charges of Criminal Breach of Trust and Falsification of Accounts — Criminal Procedure Code S. 165.

In this case the Appellant was tried before the District Court at Ipoh on a charge of criminal breach of trust under S. 408 of the Penal Code and two charges of falsification of accounts under S. 477A of the Penal Code. These charges were tried together with a similar charge of criminal breach of trust against one E. A. Nunn. In the course of the proceedings the first charge against the Appellant was amended by the insertion of the words "jointly with E. A. Nunn, the manager of the said Messrs. Whiteaway, Laidlaw & Co., Ltd." In the event he was convicted on the first charge as originally framed and on the other two charges. No application was made for a separate trial.

Held, (Thomson, J.), distinguishing the cases of **King Emperor v. Attursing,** A.I.R. 1932 (Sind) 64 and **Emperor v. Manant K. Mehta,** I.L.R. 49 Bombay 895, that where there is one charge of embezzlement and that embezzlement refers to the two charges of falsification of accounts then those offences were so connected as to form part of the same transaction within the scope of S. 165 of the Criminal Procedure Code. Appeal was dismissed.

T. E. Conaghan for the Appellant.

Lim Khoon Aik v. Public Prosecutor (Ipoh Dist. Ct. Cr. Case No. 198 of 1948). Decided on May 17, 1949.

Penal Code, Ss. 499, 500 — Special exceptions under Evidence Enactment, S. 105 — Finding of facts which cannot be supported.

In this case the appellant was charged with defamation under S. 500 of the Penal Code in that he stated to the complainant's manager that the complainant, S. Thuraisingam, was selling rubber belonging to the estate. The appellant was convicted on the charge and sentenced to three months simple imprisonment and from this conviction and sentence he appealed.

In the second paragraph of his grounds of decision the President of the Sessions Court held that had the complainant been asked whether the words uttered were true or not he would have stated that they were untrue. The learned President further stated that the final paragraph of S. 499 of the Penal Code makes it clear that the Court could call on an accused to make his defence even when it presumes that what the accused imputed was an imputation made in good faith. He went on to raise the question whether the Court could call upon an accused for his defence when it does not know which, if any, of the exceptions the accused might raise in his defence. He then decided that the onus is not on the prosecution to rebut all the possible exceptions and he therefore held that at the close of the case for the prosecution defamation had been proved.

Held, (Spenser-Wilkinson, J.), (1) that in no circumstances is it possible to base a finding of fact upon the supposed answer of a witness to a question which he has in fact never been asked; (2) that in criminal matters, whilst it is true that S. 105 of the Evidence Enactment casts the burden upon an accused person of proving the existence of circumstances bringing the case within any special exception contained in the Code, it has always been held, not only that this burden is not a heavy one but also that the accused is entitled, if he can, to bring himself within the exceptions by reference to facts proved by the prosecution evidence. This being so, it was the duty of the learned President, at the close of the case for the prosecution, to consider not only whether a **prima facie** case of defamation under the first part of S. 499 had been made out but also whether facts had already, at that stage, been proved which brought the case within any one of the exceptions. Appeal allowed — conviction and sentence quashed. **Rex v. Christie** (1914) A.C. 545 was referred to.

Rajasooria for the Appellant; **Forbes** (Solicitor-General) for Respondent.

Raman v. Public Prosecutor (Bentong Magistrate Summons No. 26 of 1949). Decided on May 10, 1949.

SINGAPORE.

Control of Rent Ordinance, 1947, Ss. 14 and 15 — Sub-letting not prohibited but excessive rents received — Discretion of Court.

Taylor, J. in this case held that a tenant who is not prohibited from sub-letting but receives from his sub-tenants rents exceeding three-quarters of the rent paid by him is liable to be ejected at the discretion of the Court but where he has incurred substantial expenditure for repairs the Court may postpone the operation of the Order so as to spread the cost of repairs over a reasonable period.

N. A. Mallal for the Plaintiff; **Chong Thutt Pitt** for the Defendants.

Soon Siong Poh v. Yeo Siew Lam & Anor. (Singapore Civil Suit No. 596 of 1948). Decided on May 27, 1949.

Courts Ordinance S. 8(1) — Rules of Supreme Court Order XLII Rule 1 — Application for leave to issue Writ of Attachment for contempt of Court — Alleged obstruction in prevention of civil suit by proceedings in a foreign Court.

In this case an application was made for leave to issue a writ of attachment. It was alleged that the Respondents by instituting proceedings in New York asking for **inter alia** an injunction to restrain the applicants from proceeding with an action in Singapore against the Respondents for damages for alleged breach of contract and for an injunction, wherein the applicants had applied also for relief in respect of the alleged breach of contract, had obstructed or attempted to obstruct or threatened the applicants in such suit in Singapore, and that this constituted a contempt of this Court's jurisdiction.

Held, (Gordon-Smith, J.), that on the facts there was nothing to debar the respondents from instituting the suit and making the application to the New York Court for an injunction in the exercise of their undoubted legal rights to do so and therefore even though their action might embarrass the applicants, it did not constitute a contempt of Court. Application dismissed with costs.

In re New Gold Coast Exploration Company (1901) 1 Ch.D. 860, **Plating Co. v. Farquharson** (quoted in previous reference) and **In re Septimus Parsonage** (1901) 2 Ch.D. 424 were commented upon.

Dr. C. H. Withers-Payne for the Applicants; **K. A. Seth** for the Respondents.

In the Matter of an Application on behalf of Republic Pictures International Corporation for leave to issue Writ of Attachment against Run Run Shaw and Runme Shaw for contempt. (Singapore Originating Motion No. 4 of 1949). Decided on February 28, 1949.

Negligence — Negligent driving — Damages in respect of injuries arising out of road accident.

In this suit the Plaintiff sued the Defendant for $2,000/- special and $18,000/- general damages in respect of injuries caused to him arising out of a road accident which occurred on the 19th June 1948 when crossing the road at the junction of Robinson Road and Cecil Street, Singapore. Para. 3 of the Statement of Claim alleged that such injuries were caused by a motor vehicle, a jeep belonging to the Defendant or his agent or servant then in charge and control of the said motor vehicle.

Held, (Gordon-Smith, J.), (1) if it is established from his own evidence or by evidence produced on behalf of the Defendant that the Plaintiff could have avoided the collision by the exercise of reasonable care, then the Plaintiff fails because his injury is due to his own negligence in failing to take reasonable care; (2) if it is established that although the Plaintiff was negligent, the Defendant could have avoided the collision by the exercise of reasonable care, then it is the Defendant's failure to take that reasonable care to which the resulting damage is due and the Plaintiff is entitled to recover; (3) mere failure to avoid the collision by taking some extraordinary precaution does not in itself constitute negligence; the Plaintiff has no right to complain if in the agony of the collision the Defendant fails to take some step which might have prevented a collision, unless that step is one which a reasonably careful man would fairly be expected to take in the circumstances. Claim was dismissed.

Swadling v. Cooper (1931) A.C. 1 was referred to.

A. N. Mitra for Plaintiff; **L. A. J. Smith** for Defendant.

Chaim Flanchaum v. Koh Peng Koon (S'pore Suit No. 8 of 1948). Decided on May 28, 1949.